United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

74-2044

United States Court of Appeals

For the Second Circuit

No. 74-2044

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO AND LOCAL 1101, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioners,

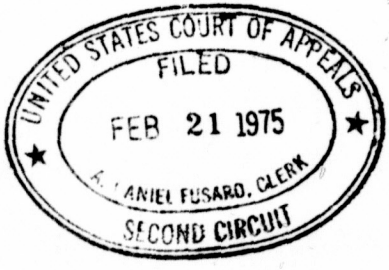
—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITIONERS' REPLY BRIEF



COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL, ESQS.
1370 Avenue of the Americas,
New York, New York 10019
(212) 757-4000

KANE AND KOONS, ESQS.
1100 Seventeenth Street, N.W.
Washington, D.C. 20036
Attorneys for Petitioners

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases:

Statutes:

United States Court of Appeals

For the Second Circuit

No. 74-2044

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO and LOCAL 1101, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioners,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS' REPLY BRIEF

In this brief we shall answer the arguments on which the Board principally relies. Because the arguments advanced by the Intervenors are substantially the same, we ask that this brief be regarded as a reply to their arguments as well.

POINT I

Sections 7 and 8(b)(1)(A) of the Act do not "protect" Rigby and the Strikebreakers from being excluded by the Unions for their disloyal acts.[1]

In its brief the Board iterates and reiterates the general statement that the activities which led the Unions to ex-

1. We shall assume, in this brief, as argued in Point II of Petitioners' main brief, that the Strikebreakers' disloyalty to the Union was not excused or mitigated by the fortuitous fact that the strike was called in violation of Section 8(d) of the Act.

clude Rigby and the Strikebreakers from membership are "protected by Section 7 of the Act." It accordingly, argues that an employee who is excluded from a union for engaging in a "protected" activity cannot be compelled to pay dues under a union security clause. The argument fails because the "protection" afforded to Section 7 activities is limited in scope and does not include protection against the action taken by the Unions in this case.

The activities referred to in Section 7 are "protected" against union action only to the extent provided for in Section 8(b)(1). The legislative history of that Section shows that its purpose was primarily to protect the organizational rights of employees from action by unions involving intimidation, violence or job-related sanctions, or the threat thereof. As the proviso to Section 8(b)(1) makes clear, it was not intended to "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."[2]

Accordingly, although Sections 7 and 8(b)(1) have been held to protect the organizational rights of employees from union efforts to cause the imposition of job-related sanctions[3] and from union fines imposed for conduct committed when the employee was not a member of the union,[4]

---

2. The legislative history of Section 8(b)(1) is set forth at length in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) at pp. 184-192.

3. See, for example, *Radio Officers' Union* v. *NLRB*, 347 U.S. 17 (1954) and *NLRB* v. *Bell Aircraft Corp.*, 206 F.2d 235 (2d Cir. 1953), both of which are cited in the Board's brief, as well as the cases cited in the second paragraph of footnote 6 at p. 7 of the Board's brief.

4. *NLRB* v. *Granite State Joint Board*, 409 U.S. 213 (1972); *Booster Lodge No. 405, IAM* v. *NLRB*, 412 U.S. 84 (1973).

it is well settled that such organizational "rights" as the "right" to support a rival union and the "right" to refuse to honor a picket line are not protected against union fines imposed for acts committed when the employee was a union member, or against expulsion or exclusion.[5]

In short, the provisions of Sections 7 and 8(b)(1) do not "protect" Rigby or the Strikebreakers from exclusion from the Unions on account of their actions.[6] Their actions are, accordingly, not "protected" insofar as this case is concerned. Therefore, the Board's argument that they may not be compelled to pay dues under the union security clause, because they have been excluded from the union for engaging in "protected" activities, is without foundation.

POINT II

The invocation of job-related sanctions, after Rigby and the Strikebreakers were lawfully excluded from the Unions, is not precluded by Section 8(b)(2) of the Act.

The Board's argument that the Unions may not invoke the union security clause against Rigby or the Strikebreakers to compel them to pay their dues because "Section

5. As to fines, see, for example, *NLRB* v. *Allis-Chalmers Mfg. Co., supra; Scofield* v. *NLRB*, 394 U.S. 423 (1969); and *NLRB* v. *The Boeing Company*, 412 U.S. 67 (1973). As to expulsion and exclusion, see authorities cited at pp. 22 and 23 of Petitioner's main brief.

6. In denying Rigby's appeal from the dismissal of his charge insofar as the charge was directed to Local 1104's refusal to accept Rigby into membership, the General Counsel of the Board has decided this question in respect to Rigby (13a-14a). See also the statements of Counsel for the Board at the hearing before the Administrative Law Judge at 40a-41a, 55a. As to the Strikebreakers, see footnote 1, *supra*.

8(b)(2) by its literal terms prohibits job-related sanctions where an employee has been denied membership on grounds other than payment of dues" is without merit.

The Board concedes the general principle that job-related sanctions may be imposed under a valid union security clause "to enforce an obligation to pay dues and fees", citing Sections 8(a)(3) and 8(b). A construction of Section 8(b)(2) to mean that a union's right to invoke job-related sanctions for failure to pay dues and fees disappears the moment the employee is denied membership for some other reason, no matter how valid and lawful, is untenable in view of its background and legislative history.[7]

It must be remembered that the present provisions of Sections 8(a)(3) and 8(b) were enacted as part of the Taft-Hartley Law (Labor Management Relations Act of 1947) at a time when closed and union shop clauses were permitted in collective bargaining agreements under which employees who were excluded from or deprived of union membership for whatever reason were automatically subject to denial of or discharge from employment. Union membership was a necessary condition to getting and holding a job, and, correlatively, it was only through depriva-

7. It is well settled that, in construing the Act, even where its terms appear clear on their face, . . . recourse to legislative history to determine the sense in which Congress used the words is not foreclosed. We have only this Term again admonished that labor legislation is peculiarly the product of legislative compromise of strongly held views, [citing case] and that legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace conduct called in question [citing case]. Indeed, we have applied that principle to the construction of § 8(b)(1)(A) itself in holding that the section must be construed in light of the fact that it "is only one of many interwoven sections in a complex Act, mindful of the manifest purpose of the Congress to fashion a coherent national labor policy." *NLRB* v. *Allis-Chalmers Mfg. Co., supra*, 388 U.S. at pp. 179-180.

tion of membership that unions could invoke job-related sanctions to enforce dues payments and other union requirements.

Accordingly, in enacting the 8(a)(3) provisos and 8(b)(2), the objective of which was to prohibit the use of job-related sanctions against employees for any purpose other than the enforcement of dues payments,[8] it was natural for those who drafted the legislation to frame the operative language in terms of *membership.* Thus the second 8(a)(3) proviso forbids an employer to discriminate against an employee "*for nonmembership in a labor organization* . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender . . . [dues and fees]" (italics supplied). And Section 8(b)(2), which was obviously designed to prohibit unions from seeking to cause employers to violate the second 8(a)(3) proviso,[9] must be given a parallel construction, forbidding a union to cause an employer to discriminate *on account of nonmembership* where membership has been denied for reasons other than failure to tender dues or fees.

In short, the language of 8(b)(2) forbidding a union to cause an employer to discriminate against an employee who has been denied union membership on a ground other than failure to tender dues and fees, when viewed in the light of its historical background, statutory context and legislative history, must be construed simply to mean that a union may not seek to invoke job-related sanctions except for nonpayment of fees or dues. The use of the term "member-

8. See the discussion of the legislative history of the 8(a)(3) provisos in *NLRB* v. *General Motors Corporation,* 373 U.S. 734 (1963), esp. at pp. 740-741.

9. See S. Rept. No. 105 on S.1126 (80th Cong. 1st. Sess.) at p. 21, Leg. Hist. p. 427.

ship" undoubtedly arose from the fact that union security clauses, which were designed to enforce dues payments and other union requirements, made no reference to such requirements *per se* but simply made continued employment dependent on union membership, which unions were free to grant or to withhold. Thus, despite the use of the term "membership", Section 8(b)(2) and the 8(a)(3) provisos were designed to protect employees not against loss of union membership but only against loss of jobs.[10] Congress plainly contemplated that an employee expelled from a union for whatever reasons[11] could not be deprived of his job because of his expulsion, but could still be required to pay his dues under a valid union security clause.

Thus, Senator Taft, one of the principal sponsors of the Act, declared (93 Cong. Rec. 3953, Leg. Hist. 1016):

> The bill further provides that if the man is admitted to the union, and subsequently is fired from the union for any reason other than nonpayment of dues, then the employer shall not be required to fire that man. In other words, what we do, in effect, is to say that *no one can get a free ride in such a shop. That meets one of the arguments for the union shop.*

10. As the Supreme Court said in *Allis-Chalmers, supra*, Section 8(b)(2) ". . . is concerned with union powers to affect a member's employment . . . Section 8(b)(2) limits union power to compel an employer to discharge a terminated member other than for 'failure [of the employee] to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.' It is significant that Congress expressly disclaimed in this connection any intention to interfere with union self-government or to regulate a union's internal affairs." (388 U.S. at p. 184).

11. The Unions concede for the purposes of this case that a union may not demand the discharge under a union security clause of an employee who has been excluded or expelled from a union for a reason such that the exclusion or expulsion constitutes an unfair labor practice under Section 8(b)(1).

> *The employee has to pay the union dues.* But on the other hand, if the union discriminates against him and fires him from the union, the employer shall not be required to fire him from the job. During the testimony we heard of a case in which a union member saw a shop steward hit a foreman. That union member was called to testify in court, and he testified that he saw the shop steward hit the foreman. Subsequently, the union called him before their board for discipline, and said that for him to testify as he did was unfair to the union, although he had been subpenaed to testify in court and sworn. Thereupon he was fired from the union, and under the union agreement the employer would have to fire him. Under this bill the employer would not have to fire that man *unless he did not pay his union dues.* (italics supplied)

Similarly, Senator Ellender, one of the supporters of the Act, declared (93 Cong. Rec. 4262, Leg. Hist. 1068):

> In order to protect the employees a union cannot cause the discharge of any of its members simply because it wants to blackball them such as in the De Mille case or the McGrath case. *The union may still expel a man but so far as the employer is concerned he does not have to fire that man so long as that employee pays his dues to the union.* I think this provision is bound to prevent such abuses as I discussed a while ago. (italics supplied)

POINT III

The Unions did not, as a matter of fact, seek the discharge of Rigby and the Strikebreakers because of their acts of disloyalty.

The statement contained at p. 9 in the Board's brief that what the Unions did "was really an attempt to cause

. . . [Rigby's and the Strikebreakers'] discharge because of their protected activity" is contradicted by the record.

The answers of the Unions both allege that the Unions denied membership to the employees in question because of their acts of disloyalty (10a, 27a) but that they seek their discharge because of their refusal to pay their agency fees under the union security clause (11a-12a, 29a-30a). As neither the Board nor the Intervenors traversed these allegations or introduced evidence to contradict them, they must be taken as fact for the purposes of this case. What is more, the Administrative Law Judge expressly found that ". . . Local 1104 requested the New York Telephone Company to terminate . . . [Rigby's] employment *for failure to pay the agency shop fee*" (83a, italics supplied).

There is simply no basis in fact for the Board's assertion. The Unions do not seek and have never sought to impose job-related sanctions on Rigby or the Strikebreakers because of their acts of disloyalty. The Unions seek the imposition of such sanctions only to compel them to pay their dues under a valid union security clause. Rigby can continue to organize on behalf of other unions and the Strikebreakers can continue to cross union picket lines without fear of job-related sanctions as long as they pay their way.

POINT IV

There is no merit to the Board's contention that job-related sanctions would actually have the effect of discouraging Rigby and the Strikebreakers from engaging in a "protected activity" and that therefore the Unions can be imputed to have invoked job-related sanctions to punish Rigby and the Strikebreakers for their acts of disloyalty.

The court cases on which the Board relies in support of this claim, namely, *NLRB* v. *Bell Aircraft Corp.*, 206

F.2d 235 (2d Cir. 1953) and *Radio Officers Union* v. *NLRB*, 347 U.S. 17 (1954) are not in point because in both cases job-related sanctions were invoked to compel action other than the payment of union dues. In *Bell Aircraft* job-related sanctions were invoked to punish a member against whom charges had been brought within the union for having returned to work before the end of a strike. In *Radio Officers Union* job-related sanctions were invoked to encourage membership in the union and observance of union rules.

The Board cases on which the Board now relies are *Local 4186, United Steelworkers (McGraw-Edison Co.)*, 181 NLRB 83 (1971) and *Communications Workers of America, Local 9509 (Pacific Telephone and Telegraph Co.)*, 193 NLRB 83 (1971), which are the cases on which the Administrative Law Judge and the Board relied below.

The rationale of those cases, which the Board seems to adopt in its brief, is that where membership rights have been reduced, no matter how validly and lawfully, subsequent attempts to enforce dues payments by the imposition of job-related sanctions have "the foreseeable effect of encouraging adherence to the Unions' views and discouraging protected activity". From which the Board concludes that, under such circumstances, the Union's invocation of job-related sanctions to enforce dues payments ". . . cannot be dissociated from the suspension of membership rights . . ." (*McGraw-Edison Co.*, quoted at Board's brief, p. 10).

This argument is fallacious. Compelling Rigby and the Strikebreakers to pay dues despite their exclusion from the Unions will not discourage them in the exercise of organizational activities.

A sanction will discourage the exercise of an activity only if it is imposed when one engages in the activity and is

not imposed when one does not engage in the activity. As Rigby and the Strikebreakers would plainly have had to pay their dues had they not been excluded from the Union and will plainly have to pay them if they are one day admitted, it is hard to see how their having to pay them now, when they have been excluded, operates to discourage them from committing the acts that led to their exclusion.

Of course, if Rigby and the Strikebreakers are excused from paying their dues by virtue of their exclusion, then no doubt they and other disgruntled employees may be *encouraged* to avoid having to pay dues by committing acts which make it intolerable for the Unions to continue them as members. But to say that employees may be affirmatively encouraged to commit disloyal acts if they can thereby avoid dues payments is not equivalent to saying that requiring them to pay dues has the negative effect of discouraging them from committing such acts.

POINT V

There is no merit to the Board's claim that "membership was not available" to Rigby and the Strikebreakers "on the same terms and conditions as generally applicable to other members" and that, therefore, the Unions are precluded from invoking job-related sanctions against them for their non-payment of dues.

As a matter of fact, membership is available to all who seek it on the same terms and conditions. There was no discrimination against Rigby or the Strikebreakers. If they had been loyal to the Unions, they would have been granted membership, and, conversely, any other employees of the Company who engage in similar acts of disloyalty will similarly be denied membership.

As the authorities cited in the Unions' main brief at pp. 22-23 establish, a union may, for self-protection, require

loyalty as a condition of membership. The fact that the imposition of such a reasonable condition may require the exclusion of those who do not comply with the condition does not mean that membership is not available to everyone on the same terms and conditions. The requirement of an oath of allegiance to a union may lead to the exclusion of those who refuse to take the oath (see *Union Starch & Refining Co.* v. *NLRB*, 186 F. 2d 1008, discussed in the Union's main brief at pp. 10-12); but no one would claim that because of that requirement, union membership is not available to everyone on the same terms and conditions. A requirement that union members and prospective union members refrain from engaging in disloyal activities is no different.

Actually, the statutory provisions on which the Board relies were plainly not designed to prohibit what the Unions have sought to do in this case.

Those provisions are contained in the second 8(a)(3) proviso which, among other things, forbids an employer to discriminate against an employee ". . . for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members. . . ." This language is, in turn, embodied by reference into Section 8(b)(2) by the mandate that a union shall not cause an employer to discriminate against an employee in violation of Section 8(a)(3). On its face, the prohibition of 8(a)(3) applies only where the discrimination is made because of "*non-membership* in a labor organization".

Furthermore, the legislative history of the provision in question shows that it was not intended to prevent a union from imposing reasonable conditions on admission to mem-

bership, but rather to prevent employees who were excluded from a "closed" union from losing their jobs under a closed shop contract. Thus in its Report (S. Rept. No. 105, 80th Cong. 1st Sess., p. 20; Leg. Hist., p. 426) the Senate Committee declared with respect to Section 8(a)(3):

> The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee *in his job* if unreasonably expelled or denied membership. (italics supplied)

In discussing the provision in the course of the debates, Senator Taft said (93 Cong. Rec. 3952-3953, Leg. Hist. p. 1010:

> There are two conditions which we have imposed even on the union shop. In the first place, the men must vote that they wish to have such a union shop provided for in the contract....
>
> In the second place, we have proposed a proviso in the case where a man is refused admittance to a union, when an employer employs a nonunion man, and during the first 30 days of his employment he goes to the union and says, "I want to join the union," but the union refuses to take him. It is provided that in such case the employer shall not be compelled to discharge the man simply because the union will not let him join the union on the same terms and conditions as any other member. *In effect we say, "If you are going to have a union shop, then you must have an open union. You cannot say to people, 'We have a closed union shop, and we are not going to let you in under any circumstances.'"* (italics supplied)

In the case at bar, therefore, the provision in question is inapplicable not only because there has been no violation of its literal requirement that membership be open to all on the same terms, but also because there is no closed shop-closed union situation here and the Unions have invoked job-related sanctions not because of non-membership but in order to compel the payment of dues.

POINT VI

The Board's claim that the agency fees that the Unions seek to collect from Rigby and the Strikebreakers would not be used solely to provide collective bargaining services to them is without support in the record.

The Board's claim here, which it raises for the first time in this Court, is predicated on the fact that the record does not show that there is any difference in the amounts of fees assessed against full members of the Unions and the amounts sought from the employees denied membership. From this the Board concludes that the fees sought from Rigby and the Strikebreakers would not be used solely for their benefit.

This argument is specious. The Board's conclusion is valid only on the assumption that part of the dues and fees collected by unions is *invariably* used to provide services that inure only to the benefit of members and not to the benefit of unit employees who are not members. There is no basis for making this assumption. No doubt there are unions—and there is nothing in the record to show that the Unions in this case are not among them—all of whose dues and fees are used, directly or indirectly, to provide services that inure equally to the benefit of members and nonmembers alike.[12]

12. Since it cannot be assumed that part of the dues and fees collected by a union will *always* benefit only members and not nonmembers, this Court cannot accede to the request of the Telephone

(footnote continued on next page)

Entirely apart from the invalidity of the Board's argument based on the supposed silence of the record, the fact is that the record is not silent, and what it contains supports the Unions' position. The Answers of the Unions in both the Rigby and the Telco cases allege that the dues received from both members and non-members and retained by the Unions constituted "compensation for their services rendered" as collective bargaining representatives and for the administration of the Collective Bargaining Agreement (11a, 28a). The Board not only has not denied these allegations but it did not offer any evidence at the hearing to contravert them. Accordingly, they must be taken as fact on this appeal.

CONCLUSION

As the Board recognizes in its brief, this case presents the question left open in *NLRB* v. *General Motors Corporation*, 373 U.S. 734 (1963) (footnote 12 on p. 744) regarding the circumstances under which an employee may be required to pay dues and fees where membership is "desired but unavailable". We believe the answer is clear that where, as here, the employee's exclusion or expulsion is because of activities or behavior of such a nature that the exclusion or expulsion is valid and lawful under the proviso of Section 8(b)(1)(A), the union may invoke job- related sanctions to require the employee to pay union dues or agency fees.

The sharp dichotomy that the Board seeks to draw between an employee who has the "option" of being a union member and an employee who does not have that "option" is not valid where membership has been denied for disloyal

---

(footnote continued from previous page)

Company (which, for the first time in this Court, makes substantially the same argument as the Board on this point) that it take judicial notice of the alleged "fact" that "union dues pay for services or expenditures that do not necessarily benefit non-members."

conduct. An employee may resign from a union to escape the contractually imposed obligations of membership (see: *Scofield* v. *NLRB*, 394 U.S. 432, 430 (1969)), or he may be excluded from membership for refusing to perform an act which is a reasonable requirement for membership (e.g., taking an oath of allegiance to the union, as in *Union Starch*, *supra*). But no one would claim that such an employee could thereby escape the imposition of job-related sanctions to compel him to pay dues. There is no reason why an employee who has been lawfully excluded from a union for an act of disloyalty should be in any better position. By committing a disloyal act he has, in effect, exercised his option *not* to belong to the union. Under such circumstances, there is no reason why the union should be put in the dilemma of having either to permit a disloyal employee to participate in its operations and affairs or to excuse him from paying his share of the cost of the services that it renders.

Accordingly, for all of the reasons stated herein and in the Unions' main brief, it is respectfully prayed that the Board's order sought to be reviewed herein should be set aside.

Respectfully submitted,

COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL, ESQS.
1370 Avenue of the Americas
New York, N.Y. 10019

KANE AND KOONS, ESQS.
1100 Seventeeth Street, N.W.
Washington, D.C. 20036

CHARLES V. KOONS, ESQ.
H. HOWARD OSTRIN, ESQ.
DANIEL W. MEYER, ESQ.
Of Counsel